STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2003
v	No. 231336 Wayne Circuit Court
DONALD MELVON SMITH, Defendant-Appellant.	LC No. 98-002006-FY

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant, who was charged with two counts of first-degree murder, MCL 750.316, was convicted of a single count of second-degree murder, MCL 750.317, following a jury trial.[1] He was sentenced to a term of fifteen to thirty years' imprisonment. He appeals by delayed leave granted. We affirm.

I. Basic Facts

Defendant was a squatter in a home located in Detroit. Codefendant Ralph Proctor, defendant's relative, lived with defendant. On January 20, 1998, at approximately 11:00 p.m., defendant, Proctor, Proctor's girlfriend, and two other women were in defendant's basement smoking crack. The two victims, Karen Hamm and Sidney Robinson, arrived later, separately. After Hamm arrived, she began to smoke crack with the group. Proctor was angry at Hamm because he believed that she gave the telephone number of his girlfriend's grandmother to someone that was looking for him, and the grandmother was receiving threatening calls. Robinson arrived at the house shortly thereafter, while everyone was in the basement. Defendant answered the door.

[1] Defendant was tried jointly with codefendant Ralph Proctor, before separate juries. Proctor was convicted of one count of first-degree murder and one count of second-degree murder. His convictions were affirmed by this Court in *People v Proctor*, unpublished opinion per curiam, issued December 21, 2001 (Docket No. 223447). His application for leave to appeal to our Supreme Court has been held in abeyance pending a decision in *People v Gonzalez*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2001 (Docket No. 220715), lv gtd 467 Mich 898 (2002).

When defendant returned to the basement with Robinson, Proctor had tied Hamm in a chair, with her arms behind her back, and had placed an extension cord around her neck. Defendant and Proctor exchanged words regarding Hamm, and Proctor untied Hamm and gave her some more crack cocaine. Proctor then again became angry at Hamm and Robinson because he believed that they were stealing drugs from defendant's house. Proctor put a rope around Hamm's neck and strangled her. Defendant testified that Proctor then gave a gun to one of the women and told her to shoot defendant if he moved. Defendant claims that Proctor instructed defendant to strangle Robinson. Defendant testified that he grabbed a piece of clothesline from the floor and started strangling Robinson until he passed out on the floor. Robinson then started gasping for air. Defendant claims that Proctor told defendant to let Robinson live, however, Proctor then changed his mind and told defendant to "finish it." Defendant then strangled Robinson until he died. Defendant admitted that it took more than two minutes to strangle Robinson. Robinson gagged and gasped for air as defendant strangled him. Proctor denied that he in any way forced or coerced defendant to murder Robinson. Defendant testified that he believed that Proctor would kill him if he did not kill Robinson.

After the killings, defendant and Proctor took the bodies outside, placed them in Hamm's car and drove them down the street and around the corner. The police found both bodies inside Hamm's car, near defendant's house. Both victims died of ligature strangulation. Following a jury trial, this appeal ensued.

II. Analysis

Defendant first argues that there was insufficient evidence of premeditation and, therefore, the trial court should have granted his motion to quash the information. Additionally, defendant argues that the trial court should have granted his motion for a directed verdict on the charge of first-degree murder.[2] We disagree. The sufficiency of the evidence at trial is evaluated by reviewing the evidence in the light most favorable to the prosecution. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The test is whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *Id*.

"To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). The evidence at trial indicated that it takes ten to fifteen seconds for a strangulation victim to lose consciousness, and at least two minutes to suffer irreparable brain damage, and longer if the victim struggles. The victim had defensive injuries consistent with a struggle. Defendant admitted that it took at least two minutes to strangle the victim. He also told the police that he began strangling the victim, stopped briefly, and resumed strangling him until he died. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a reasonable jury to find, beyond a reasonable doubt, that defendant had a sufficient "opportunity to take a 'second look' at his contemplated actions." *Id.*

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[2] At trial, the court granted defendant's motion for a directed verdict of acquittal on the count involving victim Karen Hamm, but the charge of first-degree murder involving victim Sidney Robinson was submitted to the jury.

Furthermore, we find unpersuasive defendant's argument that the Michigan Supreme Court's decision in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), warrants reversal because the higher, unwarranted first-degree murder charge contributed to the jury's verdict. The *Graves* decision deals with situations where there is insufficient evidence presented to support a charge, and consequently, error occurs in the form of a compromise verdict after submitting the unwarranted charge to a jury. *Graves, supra* at 487-488. In the present case, there was sufficient evidence to submit the charge of first-degree murder to the jury, although defendant was only convicted of second-degree murder.

Defendant also argues that there was insufficient evidence of malice to support his conviction of second-degree murder. We disagree. To convict a person of second-degree murder, the prosecution must show that the defendant acted with malice. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act with wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *Id.* at 464.

In the present case, it is undisputed that defendant intentionally killed the victim. Defendant essentially argues, however, that his conduct should be mitigated because codefendant Proctor threatened to shoot him if he did not kill the victim. However, "[t]he absence of provocation is not an actual element of the crime of second-degree murder that the prosecutor must prove beyond a reasonable doubt." *People v Hopson*, 178 Mich App 406, 410; 444 NW2d 167 (1989).

The conduct described by defendant would constitute duress, which is not a defense to murder. See *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997); see also *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). Even if the conduct described by defendant could be considered provocation rather than duress, defendant merely presents a factual question that was rejected by the jury. Evidence of an affirmative defense or mitigating factors does not render the prosecution's case insufficient as a matter of law. Defendant admitted to grabbing a clothesline and strangling Robinson until he died. Credibility of the witnesses is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Therefore, the evidence presented at trial, viewed in a light most favorable to the prosecution, was sufficient to enable a reasonable jury to find, beyond a reasonable doubt, that defendant acted with malice when he killed the victim.

Next, defendant argues that the trial court erred by denying the jury's request to rehear certain testimony without leaving open the possibility that the request might be granted at a later time. We disagree. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 213-216, 218-220; 612 NW2d 144 (2000). Defense counsel expressed affirmative satisfaction with the trial court's handling of the jury's request. This approval extinguished any error, and thus, precludes appellate review of a claimed deprivation of those rights. *Carter, supra* 462 Mich 215-216. Therefore, this issue has been waived and may not be reviewed on appeal.

Defendant also argues that the trial court deprived him of due process by closing the courtroom to the public during jury instructions. We disagree. Defendant failed to object to this alleged error below, and thus, this issue was not preserved. MRE 103; *People v Ramsdell*, 230

Mich App 386, 404; 585 NW2d 1 (1998). Therefore, our review is limited to the plain error rule. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The record indicates that the trial court did not want anyone entering or exiting the courtroom while it was instructing the jury, it does not indicate that the court precluded any member of the public from being present during instructions. Defendant has failed to show a plain error.

Defendant next argues that the trial court erred in failing to sua sponte give a cautionary instruction concerning accomplice testimony. We disagree. By affirmatively approving the instructions as given, defendant has waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; ___ NW2d ___ (2002); see also *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). Accordingly, the alleged instructional error has been extinguished and is not susceptible to review on appeal. See *Carter*, *supra* at 218-220.

We also reject defendant's claim that counsel was ineffective for failing to request a cautionary instruction. The concerns motivating the requirement of a cautionary instruction, promises of leniency inducing false testimony and undue weight given to accomplice testimony presented by the prosecution, were not present in this case. See *People v Reed*, 453 Mich 685, 691-692; 556 NW2d 858 (1996). Additionally, codefendant Proctor's motivation to lie was thoroughly explored on cross-examination by defense counsel. Defendant has failed to overcome the presumption that the challenged conduct might be considered sound trial strategy. *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994). Further, defendant has not demonstrated the requisite prejudice to establish ineffective assistance of counsel. *Id.* Defendant has not demonstrated that the result of his trial would have been different had an instruction on accomplice testimony been given.

Next, defendant argues that the trial court erred by denying his motion for complete severance of his trial from that of codefendant Proctor. We disagree. The decision to sever or join the trials of codefendants lies within the sound discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Severance is mandated under MCR 6.121(C) only when a defendant clearly and affirmatively demonstrates through an affidavit or offer of proof that his substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential prejudice. *Id.* "The use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials." *Id.* at 351. Where separate juries are used, the issue is whether there was prejudice to the defendant's substantial rights after the dual-jury procedure was employed. *Id.* at 351-352.

Defendant and codefendant Proctor presented inconsistent, mutually antagonistic defenses. Both agreed that defendant killed the victim. However, defendant alleged that Proctor forced him to do it, while Proctor denied this. Because dual juries were used, there was no danger that one jury would "convict one defendant, despite the absence of proof beyond a reasonable doubt, in order to rationalize the acquittal of another." *Hana*, *supra* at 360. Each jury was concerned only with the credibility of one defendant and they could easily have reached inconsistent results. Further, each defendant was charged as an aider and abettor in the charged killings. However, in such circumstances where defendants attempt to cast blame on each other, this does not create mutually exclusive antagonistic defenses. *Hana*, *supra* at 360-361. Last,

because each defendant waived their Fifth Amendment rights, whether they were tried together or separately, their jury was going to hear the codefendant's version of what happened.[3] *Hana*, *supra* at 361-362. Thus, both defendants had a full and fair opportunity to present their defenses to their separate juries. The trial court did not err in denying defendant's motion for complete severance.

We also reject defendant's claim that the trial court erroneously limited his cross-examination of codefendant Proctor. A court's limitation of cross-examination is reviewed for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). The record does not factually support defendant's claim that he was precluded from thoroughly cross-examining Proctor concerning ownership of the gun. Additionally, although defendant initially requested that he be allowed to question Proctor about an uncharged crime, he later withdrew his request. Accordingly, we find no merit to this issue.

Last, defendant argues that his fifteen to thirty year sentence is disproportionate to the offense and the offender, and that the court failed to sufficiently articulate its reasons for the sentence imposed. We disagree. The sentencing guidelines[4] recommended a minimum sentence range of fifteen to thirty years. Defendant was sentenced at the low end of this range and, therefore, his sentence is presumptively proportionate. See *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to overcome the presumptive validity of this sentence. *People v Milbourn*, 435 Mich 630, 656; 461 NW2d 1 (1990). Furthermore, the trial court's reference to the sentencing guidelines at sentencing was sufficient to satisfy the articulation requirement. Therefore, remand for further articulation is unnecessary. See *People v Kreger*, 214 Mich App 549, 555; 543 NW2d 55 (1995).

III. Conclusion

In sum, there was sufficient evidence of premeditation, therefore any error in the district court's bindover decision was harmless. Further, there was sufficient evidence to submit the charge of first-degree murder to the jury. Additionally, there was sufficient evidence of malice to support defendant's conviction of second-degree murder. Defense counsel extinguished any error by expressing affirmative satisfaction of the trial court's handling of the jury's request and the trial court's failure to sua sponte give a cautionary instruction concerning accomplice testimony. Defendant has failed to show a plain error regarding the trial court's decision to close the courtroom to the public during jury instructions. Defense counsel was not ineffective for failing to request a cautionary instruction regarding accomplice testimony. The trial court did not err in denying defendant's motion for complete severance. The trial court did not erroneously limit the cross-examination of codefendant Proctor. Last, defendant's sentence was presumptively proportionate and defendant has failed to overcome the validity of his sentence.

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[3] A reviewing court may not employ a "what if" analysis to guess whether one or both defendants would have testified if they had been tried separately. See *Hana*, *supra* at 361.

[4] Because defendant's crime was committed before January 1, 1999, the former judicial guidelines were used at sentencing. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra